

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

BLUE WATER SPORTS MANAGEMENT, LLC  
d/b/a, MICHIGAN ELITE VOLLEYBALL ACADEMY  
a Michigan Limited Liability Company,

Plaintiff,

vs.

Case No. 2013-4805-CZ

ULTIMATE VOLLEYBALL GROUP, LLC a/k/a  
TEAM DETROIT VOLLEYBALL a/k/a  
VOLLEYMASTERS TRAINING SYSTEMS, a  
Michigan Limited Liability Company, JEFFREY D.  
GABEL, PAIGE GABEL, LAWRENCE WYATT,  
AMBER WYATT, EDWARD RUHL, BRANDON  
PARSLEY, JOHN KALUGAR, and SHILO STEWART,  
jointly and severally,

Defendants.

\_\_\_\_\_ /

OPINION AND ORDER

Plaintiff and Defendants have each filed a brief on the amount of sanctions that should be imposed on Defendants for violating the Court's April 21, 2014 Order.

*Facts and Procedural History*

In 2010, Elite Sports Center, Inc. ("Elite Sports") defaulted on certain financial obligations to Ellmor properties II, LLC ("Ellmor"). In June 2010, Ellmor foreclosed on all of Elite Sports' assets. In July 2010, Ellmor sold the assets to Plaintiff pursuant to an asset purchase agreement ("Purchase Agreement"). Pursuant to the Purchase Agreement, Ellmor retained a security interest in the subject assets. After purchasing the assets Plaintiff began operating its own volleyball and athletic training facility in Warren, MI.

Plaintiff hired Defendants Lawrence Wyatt, Amber Wyatt, Edward Ruhl, Brandon Parsley, John Kalugar and Shilo Stewart as coaches/employees (“Employee Defendants”). In 2013, the Employee Defendants allegedly began working on setting up Team Detroit Volleyball. Plaintiff also alleges that the Employee Defendants used its client and player information lists and email lists to build their new business and to take away Plaintiff’s customers.

On December 4, 2013, Plaintiff filed its complaint in this matter against Defendants alleging: Count I- Civil Conspiracy; Count II- Concert of Action; Count III- Conversion; Count IV- Business Defamation; Count V- Misappropriation of Trade Secrets; Count VI- Tortious Interference with an Advantageous Business Relationship of Expectancy, and; Count VII- Preliminary Injunction.

On April 21, 2014, the Court issued its Opinion and Order granting Plaintiff’s request for a preliminary injunction. Specifically, the Court’s Order provided:

Defendants are hereby enjoined and restrained, directly or indirectly, whether alone or in concert with others, including any officer, agent, employee and/or representative, until further order of this Court, from sending communication, soliciting or otherwise utilizing the information contained in Plaintiff’s Exhibits 6 and 8.

Further, the Opinion and Order provided that Defendants are prohibited from soliciting, emailing or otherwise contacting anyone on the customers lists (Exhibits 6 and 8) who is not an “athlete currently enrolled or participating in their program.”

On May 27, 2014, the Court held a hearing and held that Defendants had violated the April 21, 2014 preliminary injunction by sending email blasts utilizing the information contained in Exhibits 6 and 8. As a result of the violation, the Court held that Defendants would be sanctioned, but allowed the parties to submit briefs on the amount of sanctions to be imposed.

The parties have since filed the requested briefs, and the Court is now prepared to render its decision.

*Applicable Law*

Proceedings for contempt committed outside the presence of a court are generally governed by MCR 3.606 and the Revised Judicature Act, MCL 600.1701 *et seq.* But Michigan courts have both statutory and inherent authority to punish contempt of court. *In re Contempt of Dougherty*, 429 Mich 81, 91 n. 14; 413 NW2d 392 (1987). A court may seek to compel a contemtor to comply with a court order that requires or prohibits certain actions through coercive measures permitted by civil contempt, such as a fine or jail term, or to exercise criminal contempt powers by punishing a contemtor for past conduct that affronts the court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 711-713; 624 NW2d 697 (2000). In either case, a court must order a person found to be in contempt to indemnify any person who suffers actual loss or injury, including attorney fees, resulting from the contemptuous conduct. MCL 600.1721; *In re Contempt of Henry*, 282 Mich App 656, 682 765 NW2d 44 (2009); *Taylor v Currie*, 277 Mich App 85, 100; 743 NW2d 571 (2007).

In the case of civil contempt, the court rule explicitly adopts the sanctions provided in MCL 600.1715 and MCL 600.1721. See MCR 3.708(H)(5)(b). MCL 600.1711(2). MCL 600.1715 provides in pertinent part:

Except as otherwise provided by law, punishment for contempt may be a fine of not more than \$7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court.

MCL 600.1721 provides:

If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify

him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

### *Arguments and Analysis*

At the May 27, 2014 hearing the Court held Defendants in contempt for violating the April 21, 2014 preliminary injunction by sending email blasts utilizing Exhibits 6 and 8. While the parties dispute whether the number of violations should be determined by how many people they improperly contacted (16) or how many email blasts were sent (2), the Court does not find this dispute to be material to its determination of the amount of a fine to impose under section 1715. The evidence presented at the April 21, 2014 hearing failed to establish that the violations were made intentionally or in bad faith. Consequently, the Court is not persuaded that a maximum fine should be imposed. Rather, the Court is convinced that a fine of \$500.00, payable to the Macomb County Circuit Court Clerk is appropriate given the nature of the violations in this case.

With respect to actual loss under section 1721, Plaintiff asserts it continues to suffer loss of customer goodwill given the ongoing concerns expressed by parents of its athletes regarding the need to protect contact information. While Plaintiff concedes that this type of loss is difficult to calculate, it has requested \$5,000.00 to compensate for the loss of goodwill. However, the moving party has the burden of establishing the amount of loss they have sustained. *In re Contempt of Rochlin*, 186 Mich App 639, 650; 465 NW2d 388 (1990). In this case, Plaintiff has failed to prove that they have suffered a loss in goodwill as the result of Defendants' violation that amount to a loss of \$5,000.00. Consequently, this portion of Plaintiff's request must be denied.

Plaintiff also seeks to recover attorney fees and costs it has incurred as the result of Defendants' violation. Specifically, Plaintiff requests \$9,462.75 in costs and attorney fees. In support of its request, Plaintiff relies on an affidavit of its counsel, Raechel Badalamenti. Mrs. Badalamenti testified that Plaintiff is billed at a rate of \$275.00, that 34.5 hours were expended in connection with the prosecution of its motion to hold Defendants in contempt, and that Plaintiff incurred \$44.00 in costs in connection with the motion.

A reasonable fee is one that is adequate to attract competent counsel, but one that does not produce a windfall to the attorney. *See Blum v Stenson*, 465 US 886, 897, 104 S Ct 1541 (1984). In calculating an award of attorney's fees, "[t]he most useful starting point ... is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley, supra at 433*. The result of this calculation is strongly presumed to yield a reasonable fee. *City of Burlington v Dague*, 505 US 557, 562, 112 S Ct 2638 (1992). A court determines a reasonable hourly rate by reference to the prevailing market rates in the community. *See Blum, supra at 895*. The prevailing party bears the burden of establishing, by way of satisfactory evidence and the attorney's own affidavits, that the hourly rates meet this community rate. *Id.* at 895 n. 11. With respect to the number of hours expended, the prevailing party must establish that those hours were "reasonably expended." *Hensley supra at 434*. The court may exclude unnecessary hours or hours that lack proper documentation. *Id.*

In addition, the Court's calculated baseline figure may be increased or decreased in consideration of the following factors: (1) counsel's experience and professional standing; (2) counsel's skill, time, and labor expended; (3) the amount of damages sought and the result achieved; (4) the complexity of the case; (5) the expenses incurred; and (6) the nature and extent of counsel's relationship to the client. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich

573, 588; 321 NW2d 653 (1982) These factors are not exclusive and the Court may consider any additional factors pertinent to the case. *Id.*

With regards to the amount of attorney fees Plaintiff is entitled to receive, the Court must first determine whether the requested \$275.00 hourly fee requested by Plaintiff is consistent with that which is customarily charged in Macomb County for similar services. *Smith v Khouri*, 481 Mich 519, 528, 530; 751 NW2d 472 (2008). At this juncture, the Court deems it appropriate to consult the State Bar of Michigan's 2010 Economics of Law Practice Summary Report. *Id.* at 530-532. In this case, Plaintiff's counsel bills a blended associate/partner rate. The median rate for an associate is \$195.00 per hour and the mean is \$203.00 per hour pursuant to pg. 7 of the report. For partners, the median rate is \$250.00 and the mean is \$282.00 per hour. *Id.* Further, the median rate for firms practicing in Macomb County is \$225.00, with a mean of \$235.00. *Id.* at 12. Based on the above-referenced evidence, the Court is convinced that the requested rate of \$275.00 is excessive as it exceeds all but the mean rate for partners. Rather, the Court is convinced that a rate of \$225.00 per hour is a reasonable rate in this case as it is roughly the average of the 6 rates cited above.

In addition, in applying the factors under *Wood, supra*, at 588, the Court is convinced that the \$225.00 rate should be not modified. It is undisputed that Plaintiff's counsel is experienced in the areas of law involved in this case; however, the underlying motion was not complex in nature, with the issues fairly easy to research and argue and no discovery was conducted and involved. Consequently, the Court is satisfied that a rate of \$225.00 is appropriate in this matter.

With regards to the amount of hours incurred, the parties dispute the reasonableness of the hours billed. "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary

hearing to challenge the applicant's evidence and to present any countervailing evidence.”  
*Smith, supra* at 532. Due to the parties' dispute as to the reasonableness of the hours billed, an evidentiary hearing must be scheduled to resolve this matter.

*Conclusion*

Based upon the reasons set forth above, Defendants are hereby ORDERED TO PAY the Macomb County Circuit Court Clerk a fine of \$500.00 for their contempt violation WITHIN SIXTY (60) DAYS. In addition, Plaintiff is awarded attorney fees and costs to be determined at an evidentiary hearing on the amount of hours billed. The evidentiary hearing is hereby scheduled for **Friday, September 12, 2014 at 10:00a.m.** This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: August 25, 2014

JCF/sr

Cc: *via e-mail only*  
Robert W. Kirk, Attorney at Law, [bkirk@khlblaw.com](mailto:bkirk@khlblaw.com)  
Michael Robert Wolin, Attorney at Law, [mike@tishlaw.com](mailto:mike@tishlaw.com)